

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

_____)
UNITED STATES OF AMERICA,)
)
Plaintiff,)
) Docket Number
vs.) 8:19-cr-00348-PX-1
)
ALAKOM-ZED CRAYNE POBRE,)
)
Defendant.)
_____)

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE PAULA XINIS
UNITED STATES DISTRICT COURT JUDGE
Wednesday, October 25, 2023, AT 2:30 P.M.

APPEARANCES:

On Behalf of the Plaintiff:

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On Behalf of the Defendant:

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PAULA J. LEEPER
Federal Official Court Reporter
United States District Court, Greenbelt, Maryland

P R O C E E D I N G S

(Court called to order.)

THE COURT: Good afternoon. You all can have a seat.
Will the Government call the case?

MR. MORGAN: Calling the case of United States of
America v. Alakom-Zed Crayne Pobre; Criminal Case Number
PX-19-348.

Michael Morgan on behalf of the United States. Good
afternoon, Your Honor.

THE COURT: Good afternoon.

MR. FINCI: Good afternoon, Your Honor. Richard
Finci and Gar Robbins on behalf of Mr. Pobre, present to our
left.

THE COURT: Okay. Good afternoon. And thank you all
for coming in court. I think the last time we were together, I
let you know that I would announce my decision on the motion to
suppress based on the search warrant and the *Franks* hearing
that we had; I would do so orally. I'm prepared to do that
because I do believe that perfection is the enemy of good, and
that if I could get to you a -- my reasoning, even if it's not
beautifully penned with every typo and citation correctly
cited -- you know, correctly written, it's better for the case.
Because the case is going to proceed.

I'm going to deny the motions. And we'll talk about next
step.

1 So this is my decision:

2 Presently pending is Mr. Pobre's motion to suppress
3 evidence seized pursuant to a search warrant executed on his
4 home on August 14, 2018. Mr. Pobre faces charges related to
5 child pornography that were seized from the computers during
6 the search. This case has been the subject of several hearings
7 and prior decisions, all of which are incorporated in this
8 decision.

9 The Court most recently granted Mr. Pobre a *Franks*
10 hearing, which was conducted on August 11, 2023. The only
11 remaining issue for the Court to decide is whether the search
12 warrant affidavit materially misled the reviewing court to
13 erroneously find probable cause to believe that the target IP
14 address linked to Mr. Pobre's home had requested three images
15 of child pornography, which I'm going to call throughout the
16 three files of interest.

17 On this score, Mr. Pobre principally contends that the
18 affiant, Corporal Cory Mills, materially omitted from the
19 warrant affidavit that his personal observations of the target
20 IP address were, in fact, the product of two computer programs
21 called Freenet Roundup and ICACCOPS.

22 The omission, Mr. Pobre asserts, had been to leave out any
23 reference to Corporal Mills' use of these computer tools to
24 obtain data about participants of Freenet and their request for
25 suspected child pornography.

1 Relatedly, Mr. Pobre faults Corporal Mills for omitting
2 any information about how the surveillance software works or
3 any explanation for how Corporal Mills concluded that the
4 target IP address requested three files of interest.

5 This, says Mr. Pobre, misled the reviewing judge into
6 believing that Corporal Mills' stated observations were
7 reliable and accurate, when they were not, negating any
8 probable cause to believe that the target IP address had
9 requested the three files of interest more likely than not.

10 Thus, according to Mr. Pobre, the fruits of the search
11 must be suppressed pursuant to *Franks v. Delaware* at 438 U.S.
12 154-155, 1978.

13 *Franks* compels that evidence obtained during a search
14 warrant must be suppressed where two showings are made. First,
15 that the affiant, quote, intentionally or recklessly made a
16 materially false statement or omitted material information from
17 the affidavit; and, second, those material misstatements or
18 omissions led the reviewing judge to issue the warrant without
19 probable cause to believe the place to be searched contained
20 evidence of a crime.

21 Referencing *United States v. Pulley*, 987 F3.d, 370, 376 to
22 377, Fourth Circuit, 2021, quoting *United States v. Wharton*,
23 840 F3.d 163, 168, Fourth Circuit, 2016.

24 As to the first prong, whether the affiant knowingly or
25 recklessly omitted information material to the probable cause

1 during determination, defendant must show that the affiant was,
2 quote, subjectively aware that the false statement or omission
3 would create a risk of misleading the reviewing magistrate
4 judge, and nevertheless, chose to run that risk.

5 That's from *Pulley* 987 F3.d 377.

6 Omissions must be, quote, designed to mislead, end quote,
7 or, quote, in reckless disregard of whether they would mislead,
8 end quote. Taken from *United States v. Colkley*, 899 F.2d, 297,
9 301, Fourth Circuit, 1990.

10 As to the second materiality prong, the defendant must
11 show that the omission undermined, quote, the foundational core
12 of the affidavit. That comes from *Wharton*, 169. To be
13 material under *Franks*, an omission must do more than
14 potentially affect the probable cause determination.

15 It must, quote, be necessary to the finding of probable
16 cause, coming from *Colkley* at 301.

17 Whereas here, the affiant is accused of omitting
18 information, the Court must add back to the affidavit those
19 facts which the officer knew and omitted and next assess
20 whether the affidavit would still establish probable cause.
21 That's *Wharton*, F3.d at 169.

22 Quote, if the correct -- corrected warrant affidavit still
23 establishes probable cause, there is no *Franks* violation.

24 Also, from *Wharton*, quoting *Miller v. Prince George's County*
25 475 F3.d 621, 628, Fourth Circuit, 2007.

1 From the *Franks* hearing, the Court makes the following
2 factual findings:

3 Corporal Mills confirmed that even though he did not
4 expressly state as much in his affidavit, he used the two
5 computer surveillance programs, ICACCOPS and Freenet Roundup,
6 to develop the information he included in his search warrant
7 affidavit.

8 Corporal Mills' review of the ICACCOPS data revealed that
9 the target IP address had downloaded several distinct blocks of
10 child pornography, or CSAM, that's what we were calling it,
11 suspected child pornography, for three files of interest.

12 Corporal Mills copied that data and pasted it into an Excel
13 spreadsheet tool that is designed to verify that the target IP
14 address had more likely than not requested the three files of
15 interest.

16 I, obviously, collected these factual findings from the
17 hearing itself, from the transcript. I'm not going to go
18 through and pincite it.

19 The spreadsheet tool generated a, quote, Freenet target
20 summary which indicated that the target IP address was a,
21 quote, pass for all three files of interest. Corporal Mills
22 understood that a pass meant more likely than not the target IP
23 address had requested each file of interest.

24 Corporal Mills had been trained that he needed three such
25 verified files of interest before he could obtain a warrant

1 based on this information. Because he had three such files,
2 Corporal Mills prepared his search warrant affidavit and other
3 paperwork to secure the warrant.

4 Corporal Mills also confirmed that he used much of the
5 language from the Freenet target summary in his affidavit
6 nearly word for word.

7 Once Corporal Mills drafted the affidavit using the
8 language from the Freenet target summary, his reviewing
9 supervisor ordered Mills to cut information that the supervisor
10 believed would, quote, confuse, end quote, the reviewing judge.

11 The omitted language read, quote, these 29 blocks
12 represent 97 percent of the even or expected share of the
13 minimum blocks, 2,062, required to download the file, and
14 48 percent of the even or expected share of total blocks,
15 comma, 4,142 available. And the Freenet node reported an
16 average of 61.1 peers.

17 Corporal Mills testified that he had absolutely no
18 understanding of what this information meant or, in fact, any
19 of the information included in the Freenet target summary. He
20 also candidly admitted to not knowing how any of the software
21 works, and that he had been trained to simply cut, paste, and
22 plug in the data to the Excel spreadsheet tool. If he obtained
23 three passing files of interest, then he could reasonably
24 surmise that the target IP address had requested the three
25 files of CSAM, and so he could swear out a warrant.

1 In short, Corporal Mills omitted the facts supporting
2 probable cause to believe the target IP address had requested
3 three files of interest was not based on personal observations
4 but from his use of Freenet Roundup, ICACCOPS, and the Excel
5 spreadsheet tool.

6 Dr. Levine also testified at the hearing, and he explained
7 three things: First, that Corporal Mills misused the Excel
8 spreadsheet tool in such a way that while Mills had obtained
9 three, quote, pass results, the underlying report appeared to
10 reveal inaccuracies in a spreadsheet tool that did not, in
11 fact, exist.

12 Dr. Levine explained that the spreadsheet tool is designed
13 to confirm that the data collected from ICACCOPS accurately
14 identified a CSAM request from the target IP address.

15 As this Court and everybody here knows -- and I don't
16 believe the defense really meaningfully disputed -- the peer
17 review mathematical algorithm developed by Dr. Levine and his
18 team predicts with 99 percent confidence whether any given IP
19 address had requested CSAM using Freenet.

20 The Excel spreadsheet tool tests the reliability of the
21 algorithm as applied to an actual request. To receive a pass
22 in the Excel spreadsheet tool, the data must conform to five
23 variables, and the variables were explained both in the written
24 submissions and, to some degree, at the hearing.

25 The bottom line is, if the data does not conform, then the

1 results generated by his algorithm, as Dr. Levine explained,
2 and by extension, the Excel spreadsheet, do not have the same
3 99 percent confidence interval. As to this, Corporal Mills did
4 not know how to use the Excel spreadsheet tool to apply certain
5 filters for requests that he -- that had consistent, quote,
6 hops to live, or to ensure that all observations are for the
7 same, quote, node.

8 And our prior evidentiary hearings and discussions on this
9 inform those definitions.

10 Corporate Mills didn't do that and so didn't apply those
11 filters; thus, even though Corporal Mills had received a pass
12 for each file of interest, the spreadsheet results in the Mills
13 affidavit and on which the defense expert relied were simply
14 erroneous.

15 And in that regard, the defense expert report from
16 Mr. Miglianti, I hope I'm saying his name right, attempted to
17 show that the Excel spreadsheet tool was unreliable by taking
18 the five criteria that Dr. Levine had identified as hallmarks
19 of reliability and manipulating the data in the Excel
20 spreadsheet to use values outside the five criteria.

21 When the expert did so, he still received a pass finding;
22 thus, he concluded that the Excel spreadsheet tool did not
23 reliably verify that the files of interest had been requested
24 by the target IP address.

25 However, as Dr. Levine explained, the defense expert made

1 the same mistakes or similar mistakes as Corporal Mills did in
2 not employing the filter function on the spreadsheet tool, and
3 so the expert's conclusion shouldn't be credited.

4 And there really wasn't any credible rebuttal to that, so
5 I accept Dr. Levine's explanation of the difference and what
6 Mr. Miglianti had identified in his report.

7 The second thing that Dr. Levine demonstrated is that if
8 used correctly, the Excel spreadsheet tool confirmed that each
9 of the files of interest more likely than not, Dr. Levine says
10 with 99 percent confidence, came from the target IP address.

11 Third, Dr. Levine also independently applied the
12 mathematical algorithm to the raw data to verify with
13 99 percent confidence that the target IP address had requested
14 three files of interest. Thus, the Court credits that the
15 affidavit accurately represented that the target IP address,
16 more likely than not, had requested the three files of
17 interest.

18 Based on these factful findings, the Court concludes that
19 Corporal Mills wasn't totally forthright about the nature of
20 his personal observations, and he omitted information relating
21 to the use of the ICACCOPS and Freenet Roundup and Excel
22 spreadsheet tools.

23 Corporal Mills also didn't tell the judge, the reviewing
24 judge, that a computer program, not he, wrote much of the
25 affidavit's substantive language, and that he omitted technical

1 explanations of why the three files of interest likely came
2 from the target IP address. And those technical explanations
3 were generated by the Freenet target summary.

4 All of this certainly kept from the reviewing court the
5 use of the computer algorithm as a tool central to the probable
6 cause determination. In the future, law enforcement, in my
7 view, is best advised not to hide such basic information from
8 the Court during the warrant application process.

9 That said, Corporal Mills presented as little more than a
10 poorly trained functionary. He had no idea how the computer
11 programs worked and relied on the accuracy and reliability of
12 what the databases revealed. While his level of ignorance in
13 this regard is really surprising, the Court need not ultimately
14 reach whether it amounts to recklessness, and this is because
15 even if Corporal Mills omitted the information with such
16 disregard, in the end, such omissions were not material to the
17 probable cause determination, the second prong.

18 Had Corporal Mills stated in the affidavit that he relied
19 on a computer algorithm whose functions he didn't understand,
20 the magistrate judge may have asked for more information about
21 the workings of the algorithm, just as Mr. Pobre has done
22 throughout these many hearings.

23 But after reviewing the testimony provided by the creator
24 of the algorithm and, obviously, his team and the peer reviewed
25 support, Dr. Levine, the Court determines that the algorithm

1 is, in fact, reliable, and did not result in a false positive
2 in this case.

3 Thus, because the Government has demonstrated that, in
4 fact, and with 99 percent confidence, according to Dr. Levine,
5 the target IP address had requested each of the three files of
6 interest, any such other omissions were not material to that
7 statement that was made in the affidavit.

8 So Corporal Mills' errors and omissions, even if included
9 in the affidavit, would not upset the ultimate conclusion that
10 the target IP address likely requested the three files of
11 interest.

12 In short, the omissions did not negate probable cause to
13 believe the target IP address was the requester of the three
14 files of interest, and so the Court must conclude no *Franks*
15 violation occurred.

16 Last, the Court addresses Mr. Pobre's alternative argument
17 that *Herring v. United States* at 555 U.S. 135, 2009, compels
18 suppression.

19 In *Herring*, the Supreme Court found in dicta that the good
20 faith exception to the exclusionary rule might not apply -- may
21 not apply to police conduct that amounted to, quote, recurring
22 or systemic negligence. In that situation, the Court suggested
23 that a traditional recklessness determination may not apply
24 because, quote, it might be reckless for officers to rely on an
25 unreliable warrant system, end quote. And that's at 146.

1 Mr. Pobre tries to extend the dicta to his case, arguing
2 that, quote, if systemic error can be shown to have been
3 present in the data considered in determining probable cause,
4 then analysis of the subjective knowledge of affiant is no
5 longer controlling, end quote. And that's found at ECF Number
6 107 and 11.

7 Although the Court does not necessarily agree with
8 Mr. Pobre's treatment of *Herring*, it ultimately doesn't matter
9 because the Government has demonstrated that the algorithm and
10 Excel spreadsheet tool, when used properly, are reliable in
11 this case.

12 And, here, correct application of both shows, with a high
13 degree of confidence, that the target IP address was the likely
14 requestor of the three files of interest. Thus, even though
15 Corporal Mills appears improperly trained on using these
16 investigative tools, a fact of concern to the Court, and which
17 could, one day, make *Herring* squarely relevant, in this matter,
18 Corporal Mills' lack of training did not produce systemic
19 erroneous results that are relevant to this determination
20 because of the previous finding I made that there was no *Franks*
21 violation.

22 Accordingly, for those reasons, Mr. Pobre's motion to
23 suppress at ECF Numbers 45 and 46 is denied. And we'll docket
24 a paperless order to that effect just adopting my oral ruling.

25 You may all have been discussing, sort of there was two

1 options, I was either going to grant it or deny it, and if I
2 was going to deny it, you may have already discussed next steps
3 in the case. Or do you need more time? Because I'm prepared
4 to put in some milestone dates, trial, in limine, put in a
5 scheduling order, if you want. Or you might need more time to
6 discuss.

7 So you tell me what the next step is, Counsel.

8 MR. FINCI: We have not discussed.

9 THE COURT: You haven't? Okay.

10 So do you want to pick a date now where we get on the line
11 for a status? It will give you an opportunity to confer
12 amongst yourselves and with each other. And then at that call,
13 you can tell me what you want to do next. Does that make
14 sense?

15 MR. FINCI: Yes, Your Honor.

16 THE COURT: All right. We also now -- Mr. Ulander,
17 can you confirm that that resolves all the gavels? Because if
18 it does, we also have to talk speedy trial, if you all want
19 another status.

20 So while Mr. Ulander is doing that, let's talk about
21 another date.

22 How much time would you like to talk to each other and
23 yourselves before we meet again?

24 MR. FINCI: Thirty days, Your Honor, is that
25 acceptable?

1 THE COURT: Yeah, I don't have -- I don't have a
2 problem with that with the understanding that, one, I would
3 need a motion to toll between now and then; and, two, that that
4 would be the date in which we either set it in for
5 re-arraignment or trial.

6 And on that score, so I'm just prepared when we talk
7 again, length of estimated trial?

8 MR. MORGAN: Um --

9 THE COURT: I would assume it's not going to be more
10 than a week. Is that --

11 MR. MORGAN: No, I think that's -- probably including
12 jury selection, five days, max, I would imagine.

13 MR. FINCI: Agree.

14 THE COURT: Would you agree? Okay. Yeah.

15 So when we talk again, if we're setting it for trial, I'm
16 looking for a week.

17 Okay. All right. So then do you want to do the last week
18 in November?

19 MR. FINCI: Beg your pardon, Your Honor?

20 THE COURT: Last week in November?

21 MR. FINCI: Yes, that would be fine.

22 THE COURT: Okay.

23 MR. FINCI: Any -- 27th? 29th?

24 THE COURT: Is anybody traveling for the holidays?

25 MR. MORGAN: Your Honor, I -- actually -- I actually

1 will no longer be with the office at that time.

2 THE COURT: What are you doing to me, Mr. Morgan?

3 MR. MORGAN: Sorry.

4 THE COURT: What? No, no, you're not allowed. Court
5 order.

6 MR. MORGAN: I apologize for that, Your Honor.

7 But there, obviously, will be someone else joining the
8 case, and so I think that week should be fine. But I will --
9 if it's okay with the Court, we can set the date, and just --
10 I'll inform everybody if there's some conflict.

11 THE COURT: Yeah.

12 MR. MORGAN: Thank you.

13 THE COURT: All right. I'm assuming I'll get the
14 back-story on that.

15 Do you know who the new -- I mean, this case has gone
16 through --

17 MR. FINCI: Multiple.

18 THE COURT: -- four AUSAs, I think? I think we might
19 be on our fourth set.

20 MR. MORGAN: I think I might be number three, Your
21 Honor.

22 THE COURT: So we'll be on number four.

23 MR. MORGAN: Yes, Your Honor.

24 THE COURT: All right. Well, whoever takes it over
25 is the United States of America and will be prepared to try it?

1 MR. MORGAN: Absolutely, Your Honor.

2 THE COURT: Okay. All right.

3 When does the defense propose having it? Because if you
4 all are traveling for Thanksgiving, I want to be mindful of
5 that.

6 I start a trial on the 27th, but it's civil, and I can fit
7 you in.

8 MR. FINCI: How about the afternoon of the 29th, Your
9 Honor?

10 THE COURT: Looks good. I have a pretrial conference
11 at 2:00. How about 3:00?

12 MR. FINCI: Thank you, Your Honor.

13 THE COURT: Okay. 3:00. We'll make it recorded;
14 3:00 p.m., November 29.

15 And then I -- I expect that there's going to be a motion
16 to toll, but can I get the parties' positions on the record now
17 with regard to tolling a speedy trial until at least that
18 followup status?

19 MR. FINCI: Of course. Since it's our request, Your
20 Honor, we have no objection to that 30 days.

21 MR. MORGAN: Of course, Your Honor, no objection.

22 THE COURT: Okay. All right. And Mr. Pobre, you're
23 doing well on pretrial release. Keep it up. No issues in that
24 regard.

25 MR. MORGAN: No.

1 THE COURT: So I'll talk to you all again November 29
2 at 3:00.

3 MR. FINCI: Thank you, Your Honor.

4 MR. MORGAN: Thank you, Your Honor.

5 THE COURT: Thank you.

6 COURT DEPUTY: All rise. This Honorable Court now
7 stands adjourned.

8 (Court adjourned at 2:59 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, Paula J. Leeper, Federal Official Court Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 4th day of November, 2023.

/s/Paula Leeper

Paula J. Leeper
Federal Official Reporter

COURT DEPUTY: [1] 18/6	
MR. FINCI: [13] 2/1 15/23 16/17 17/8 17/12 17/19 18/3 15/21 15/23 16/17 17/8 17/12 17/19 18/3	
MR. MORGAN: [13] 2/5 15/8 15/11 15/25 16/3 16/6 16/12 16/20 16/23 17/1 17/21 17/25 18/4	
THE COURT: [24]	
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/s/Paula [1] 19/15	
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advised [1] 11/7	affect [1] 5/14
affair [1] 11/23	affidavit [6] 3/18 4/15 4/24 5/1 5/17 13/4
affidavit's [1] 10/25	affidavit [17] 3/12 3/19 4/17 5/12 5/18 5/20 5/22 6/4 6/7 7/2 7/5 7/7 9/13 10/15 11/18 12/7 12/9
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anybody [1] 15/24	apologize [1] 16/6
APPEARANCES [1] 1/12	appeared [1] 8/9
appears [1] 13/15	application [2] 11/8 13/12
applied [2] 8/21 10/11	apply [5] 9/4 9/10 12/20 12/21 12/23
are [7] 3/7 4/14 9/6 13/10 13/19 16/2 17/4	arguing [1] 13/1
argument [1] 12/16	arraignment [1] 15/5
ARTHUR [1] 1/20	as [13] 4/24 5/10 6/4 8/15 8/21 9/1 9/3 9/18 9/25 10/1 11/5 11/9 11/21
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